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No. 519

In the Supreme Court of the United States

OCTOBER TERM, 1940

INDEPENDENT GASOLINE COMPANY, INC.

v.

BUREAU OF UNEMPLOYMENT COMPENSATION OF THE STATE OF GEORGIA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA.

WILLIAMS PTG. CO.-ATLANTA

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BUREAU OF UNEMPLOYMENT COMPENSATION
OF THE STATE OF GEORGIA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA.

The State of Georgia by its counsel prays that a writ of certiorari be issued to review the decree of the Supreme Court of Georgia entered in the above case July 9, 1940, reversing the decree of the Monroe Superior Court of that State which overruled the demurrer of the defendant.

OPINIONS BELOW

The decree of the trial court is set forth in the record p. 15, 16. The opinion of the Supreme Court of the State of Georgia (R. 16) is not yet reported in the official State Reports but is reported in 10 S.E.(2d) 58.

JURISDICTION

The decree of the Supreme Court of Georgia was entered July 9, 1940 (R. 16) and a rehearing was denied July 23, 1940 (R. 43). The jurisdiction of this Court is invoked under section 237(b) of the Judicial Code as amended.

QUESTION PRESENTED

Whether a State unemployment compensation law violates the equal protection clause of the Fourteenth Amend-

ment to the Constitution of the United States by providing that, for the purpose of determining whether an employer is subject to the act as employing eight or more individuals for twenty weeks, employing units under common ownership or control shall be treated as a single unit.

STATUTES INVOLVED

The basic definition of the term employer, as that term is used in the Georgia unemployment compensation law (Georgia Laws 1937, Act No. 335, enacted March 29, 1937; Georgia Code Ann. S 54-601 to S 54-659) includes:

> "Any employing unit,[1] which for some portion of a day, but not necessarily simultaneously, in each of twenty different weeks, whether or not such weeks are or were consecutive, within either the current or the preceding calendar year, has or had in employment, eight or more individuals (irrespective of whether the same individuals are or were employed on each such day)" (Section 19(g)(1) of the law) (Georgia Code Ann. §54-657 (g)(1)).

Section 19(g)(4) of the law (Georgia Code Ann. §54-657 (g)(4), includes, in addition, within the term employer:

> "Any employing unit, which together with one or more other employing units, is owned or controlled (by legally enforcible means or otherwise) directly or indirectly by the same interests, or which owns or controls one or more other employing units (by legally enforcible means or otherwise) and which, if treated as a single unit with such other employing units, or interests,

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[1]The term employing unit is defined as follows: " 'Employing unit' means any individual or type of organization, including any partnership, association, trust, estate, joint-stock company, insurance company or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person, which has or subsequent to January 1, 1936, had in its employ one or more individuals performing services for it within this State. * * *" (Sec. 19(f) of the law) (Georgia Code Ann. § 54-657 (f).

or both, would be an employer under paragraph (1) of this subsection;"[1]

STATEMENT

This case arose out of a suit instituted by the Bureau of Unemployment Compensation of the State of Georgia to collect unemployment compensation contributions alleged to be owing by the Independent Gasoline Company under the Georgia unemployment compensation law. The unemployment compensation law of Georgia in general establishes a system for the collection of contributions and the maintenance of a fund from which benefits may be paid to unemployed individuals. In its broad outlines the law is very similar to the unemployment compensation law of the State of Alabama, the constitutionality of which was upheld in *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495.

In its complaint (R. 4-6) and the amendment thereto (R. 7-9) the plaintiff Bureau alleged that Mr. H. H. Hardin, President and Treasurer of defendant, the Independent Gasoline Company, was actively engaged in the management and operation of the business of the corporation, owned a majority of the common voting stock of the defendant company and that all the remaining shares were held by his wife and his child (R. 8.) The plaintiff claimed that said Hardin was also President and Treasurer of the N. D. Arnold Telephone Company, that he owned a majority of the common voting stock of said telephone company, and that except for two qualifying shares the remaining stock in said telephone company were owned by his wife (R. 8, 9). It also alleged that an administrative investigation and hearing as to the liability of the defendant company

[1]It should be noted that this provision does not render one employing unit liable for the contributions of another; the separate employing units remain separately liable even though they are joined for the purpose of determining whether they are subject to the law.

as an employer under the Georgia unemployment compensation law has been held at which hearing it was determined that the Independent Gasoline Company and the N. D. Arnold Telephone Company were owned and controlled by the same interests (R. 9). While the plaintiff agreed that the defendant company itself employed only five employees, it alleged that considering its employment experience together with that of the N. D. Arnold Telephone Co., the defendant had in employment within the meaning of the act, eight or more employees for twenty weeks and that on this basis the defendant was an employer subject to the act (R. 9). The liability of the company to pay contributions was thereby alleged to be established under section 19(g)(4) of the Georgia unemployment compensation law quoted above.

The defendant in its demurrer (R. 10-14) and additional demurrer (R. 14-15) claimed that section 19(g)(4) of the Georgia unemployment compensation law contravened the equal protection clause of the Fourteenth Amendment to the Constitution of the United States (R. 12) (Paragraph 8 of Demurrer). The defendant also claimed that provision to be in contravention of Article 1, section 1, paragraph 2 of the Constitution of Georgia which provides that "protection to person and property is the paramount duty of government, and shall be impartial and complete." (R. 12) (Paragraph 7 of Demurrer) and of Article I, section 5, paragraph 2 of the Constitution of Georgia which provides that "enumeration of rights herein contained as a part of this Constitution shall not be construed to deny to the people any inherent rights which they may have hitherto enjoyed." (R. 14) (Paragraph 1 of additional demurrer).

The Monroe Superior Court overruled the demurrer of the defendant (R. 15, 16). An appeal was taken to the

Supreme Court of Georgia where the decision of the lower court was reversed and section 19(g)(4) of the Georgia unemployment compensation law was declared unconstitutional as a violation of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States.[1] (R. 16-21). Two justices concurred, not on constitutional grounds, but rather on the ground that as a matter of statutory interpretation section 19(g)(4) was not applicable because the enterprises conducted by the two corporations did not appear to be sufficiently related to each other (R. 21, 22).

ASSIGNMENT OF ERRORS

1. The Supreme Court of Georgia erred in failing to hold the classification involved in section 19(g)(4) of the Georgia unemployment compensation law constitutional, as a reasonable means of avoiding evasion of the provision of the law.

2. The Supreme Court of Georgia erred in holding the effect of section 19(g)(4) to be one of unreasonable discrimination when in fact its purpose and effect is to avoid discrimination.

REASONS FOR GRANTING THE WRIT

1. The importance of the question here presented and the probable harmful effects on the national system of unemployment insurance if the decision of the Georgia Supreme Court is allowed to stand.

Thirty-two states, in addition to the State of Georgia, have inserted in their unemployment compensation laws a provision very similar to that of the Georgia law now at

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[1]That the decision does not rest upon an adequate and independent non-Federal ground, see infra p—.

issue.[1] All these States have deemed the common control provision to be essential to the fair and effective administration of their law. If the decision of the Supreme Court of Georgia as to the meaning of the equal protection clause of the Federal Constitution is allowed to stand, the validity of the provision in the laws of those other States and the successful administration of the unemployment compensation programs of such States will be seriously endangered.

The scheme of the Georgia Unemployment Compensation Law and of most of the State unemployment compensation laws having this provision is as follows: In general the

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[1]Alaska, sec. 2(h)(4), Session Laws of Alaska 1937—Extraordinary Session, ch. 4; Arizona sec. 19, Session Laws of Arizona 1936—First Special Session, ch. 13, amended by Session Laws 1937, ch. 68; Colorado sec. 19(f)(4), Laws of 1936—3rd Extraordinary Session, ch. 2, amended by Laws 1937, ch. 260 (1935 Colorado Statutes Annotated, Vol. IV, ch. 167A, sec. 19(f)(4)); Connecticut sec. 804d, Public Acts 1936—Special Session, ch. 2; amended by Public Acts 1939, ch. 310 (the provision does not appear until the 1939 ch. 310 amendment); Delaware sec. 2(h)(4), Laws of Delaware—Ch. 258, amended by Laws 1939, ch. 196 (sec. 2(h) is affected but subsec. (4) remains the same); Florida sec. 3 G IV, Acts of 1937—Ch. 18402 (Compiled General Laws of Florida, Permanent Supplement, Title XI, ch. CVII, sec. 4151. (490) G IV); Georgia sec. 19 (g)(4), Georgia Laws of 1937, Act 335 (Code of Georgia Annotated, sec. 54-657(g)(4)); Hawaii sec. 2(j)(4), Laws of Hawaii 1937—Act 243—(sec. 2(j)(4) appears in Laws of 1939 Act 219 for first time); Illinois sec. 2 (e) (5), Laws of 1937—S.B. 436, p. 571, amended by Laws 1939, S.B. 458, p. 571 in which sec. 2(e)(5) was amended (originally was sec. 2(e)(4)) (Smith-Hurd Illinois Annotated Statutes, ch. 48, sec. 218 (e)(5)); Indiana sec. 2(g)(4), Laws of 1936—Special Session, ch. 4, amended by Laws 1937, ch. 125 and Laws 1939, ch. 121, p. 585 (Burns Indiana Statutes Annotated, sec. 52-1502(g)(4)); Iowa sec. 19(f)(4), Laws of 1936—Ch. 4, Extra Session, Laws of 1937, ch. 102, reenacted the law, amended by Laws of 1939, ch. 68 (Code of Iowa 1939), ch. 77.2, sec. 1551.25 F (4)); Louisiana sec. 18(f)(4), Laws of 1936, Act 97—Sec. 18 reenacted by Laws 1938, Act 164 and Laws 1940, Act No. 16 (E.S.) (General Statutes 1939, sec. 4434.18(f)(4)); Maine sec. 19(f)(4), Public Laws of 1935—First Special Session 1936, amended by P. L. 1937, ch. 228; Maryland sec. 19(f)(4), Laws of 1936—Extraordinary Session, ch. 1, amended by Laws 1937 (Special Session) ch. 2; Laws 1939, ch. 278, reenacted sec. 19 (Annotated Code of Maryland, Article 95 A, sec. 19(f)(4)); Michigan sec. 41(3), Public Acts of 1936—Extra Session, Act. No. 1, amended by Public Acts 1937, Act No. 347; (Michigan Statutes Annotated, ch. 154b, Sec. 17.543(3)); Minnesota sec. 2(f)(4), Laws of Minnesota 1936—Extra Session, ch. 2; amended by Laws 1937 ch. 43, ch. 306; Laws of 1939 ch. 443 (Mason's Minnesota Statutes, 1940 Supplement, ch. 23AA, Sec. 4337-22F (4); Mississippi sec. 19(h)(4), Laws of Mississippi 1936—ch. 176, amended by Laws 1938, ch. 147, amended by Laws 1940, ch. 295 (Mississippi Code—1938 Supplement, Sec. 2830.19(h)(4)); Missouri sec. 3(h)(4), Laws of Missouri 1937, p. 574, amended by Laws 1939, p. 887 (Missouri Statutes Annotated, Vol. 7, Sec. 13194—3(h)(4)); Nebraska sec. 2(g)(4), Laws of Nebraska 1937, ch. 108, p. 370, amended by Laws 1939,

statute will be limited to govern all employers of eight or more. However, the exemption of employers of seven or less is limited and not absolute. One of the limitations is that where two or more employing units under common ownership or control would, if grouped together, employ more than eight, they will be deemed to be covered.

The inclusion of the provision affecting this limitation results from a recognition that laws applicable to employers of eight or more can very easily be evaded by the simple procedure of splitting establishments. In certain types of business, particularly those where labor costs represent a large part of the total expenses of operation, and where efficiency would not be materially impaired by the division

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ch. 56, p. 228 (Compiled Statutes of Nebraska 1939 Cumulative Supplement, ch. 48-702(g)(4)); New Hampshire sec. 1(H)(5), Laws of New Hampshire, 1935, ch. 99, amended by Laws 1935, ch. 142, Laws 1937, ch. 178 reenacts section 1 (sec. 1(H)(5) appears for the first time); New Jersey sec. 43:21-19(h)(4), Acts of 1936, sp. sess. ch. 270, amended by Laws 1938, ch. 312, amended by Laws 1939, ch. 94 (Revised Statutes— Cumulative Supplement 1939, ch. 21, sec. 43:21-19(h)(4)); New Mexico sec. 19(f)(4), Laws of New Mexico 1936—Special Session, ch. 1, amended by Laws 1937, ch. 129, Laws of 1939, ch. 175 (1938 Supplement to New Mexico Statutes Annotated, sec. 156-319(f)(4)); North Carolina sec. 19(f)(4), Public Laws of North Carolina 1936—Extra Session, ch. 1 (North Carolina Code of 1939 Annotated, sec. 8052(19)(f)(4)); North Dakota sec. 2(f)(4), Laws of North Dakota 1937, ch. 232; amended by Laws 1939, ch. 215; Oklahoma sec. 19(f)(4), Session Laws of Oklahoma 1936, Extra Session ch. 1 (appears as ch. 52 in Session Laws 1936-37), amended by Laws 1939, ch. 52, p. 335 (Oklahoma Statutes Annotated, Title 40, sec. 229 (f)(4); Rhode Island sec. 3(5)(a)(4), Public Laws of Rhode Island 1936, ch. 2333 (sec. 3(5)(a)(4) does not appear until 1937 amendment), amended by Laws 1937, ch. 2556, amended by Laws 1939, ch. 670 (General Laws of Rhode Island 1938, ch. 284 (does not contain 1937 revision)); South Carolina sec. 19(f)(4), Acts of South Carolina 1936—Act No. 946, amended by Laws 1939, Act No. 316, p. 487; South Dakota sec. 19(f)(4), Laws of 1936, Special Session, ch. 3 (South Dakota Code 1939, sec. 17.0802(6)(d); Tennessee sec. 19(f)(4), Acts of Tennessee 1936—Extra Session, ch. 1; amended by Laws 1937, ch. 128, sec. 87, 88 (Williams Tennessee Code Annotated sec. 6901.19(f)(4); Texas sec. 19(f)(4), Acts of 1936—3rd Called Session, ch. 482, amended by Acts 1937, ch. 67, amended by Acts 1939, p. 436 (Vernon's Revised Civil Statutes Annotated, Art. 5221b—17(f)(4); Utah sec. 19(i)(4), Laws of Utah 1936—Sp. Sess., ch. 1, amended by Laws of 1937, ch. 43 amended by Laws of 1939, ch. 52 (Utah Revised Statute Supplement 1939, sec. 42-2B-19(i)(4); Virginia sec. 2(i)(4), Acts of 1936—Extra Session, ch. 1, amended by Laws of 1938, p. 1004, ch. 446, amended by Laws of 1940, p. 538, ch. 333 (1940 Cumulative Supplement to the Virginia Code of 1936 Annotated, sec. 1887(94)(i)(4); Washington sec. 19(f)(4), Laws of Washington 1937, ch. 162 (Remington's Revised Statutes of Washington sec. 9998-119 (f)(4)).

into separate units, an employer might find it profitable to split his establishments into several smaller units, each employing not more than six or seven employees.

A law having the broad social implications of unemployment compensation, cannot be administered successfully under circumstances permitting obvious evasion.

The decision of the Supreme Court of Georgia necessarily adjudicates that thousands of workers who the legislature intended should be protected from the risks and hazards of unemployment are to be denied that protection. The decision affords a great inducement to establishments with slightly more than 8 employees to so separate and divide their functions and activities as to be enabled to claim that they are outside of the coverage of unemployment compensation laws by reason of having less than 8 individuals in their employ. We cannot, of course, foretell with precision what the effect of this new decision will be. It is fair to say, however, that there are thousands of employees in Georgia (and in the 32 other States mentioned) employed by small establishments who have been afforded the protection of unemployment compensation through the enactment of the protection here at issue. There are thousands of others employed by larger establishments which may well be split up in order to achieve the exemption which this decision affords. These employees have heretofore felt secure in the belief that when unemployed they will be entitled to the benefits of the unemployment compensation law. The decision of the Georgia Supreme Court, unless reversed by this court, foretells a severe shock to them and a serious impairment of the efficacy of the national system of unemployment compensation.

The decision of the Supreme Court of Georgia will be harmful to employers as well as to employees. The major

reason impelling the legislature to exclude small employers was the administrative inconvenience in collecting taxes from them and the burden of these taxes upon a small employer who did not share the economic advantages of large scale organization. *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 511. Through section 19(g)(4) the legislature has determined that in respect to establishments which are owned and controlled in common by the same interests and which together employ more than eight employees, the difficulties and inconveniences which justify the exclusion of employers of less than eight do not apply. They might well and reasonably did believe that such establishments keep wage records, utilize bookkeeping and accounting services in common, and avail themselves of the increased profits which flow from large scale organization. In short, the reasons which justify the general exemption of employers of less than eight are not, in fact, applicable to employers of less than eight whose establishments are owned or controlled by the same interests. Indeed, if the common ownership or control provision is stricken from the law, an employer of eight or more individuals will be the object of severe economic discrimination since competitors enjoying the same advantages of size of organization that he does, would be exempted by the fortuitous circumstance that they had divided their establishments.

2. The decision of the Supreme Court of Georgia is in conflict with numerous decisions of this court and denies to the legislature the power to classify the subject of taxation in accordance with the needs of the legislation at issue.

This court in upholding the constitutionality of the Alabama unemployment compensation law, *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, did not, in specific terms, treat with the provision of the Alabama law which

was very similar to the provision of the Georgia unemployment compensation law.[1] The court, did, however treat with the basic classification of employers of eight or more and of other inclusions and exclusions of the law and confirmed the broad powers of the legislature to classify employers in the interest of sound administrative practice. This court said:

> "* * * It is argued here, and it was ruled by the court below, that there can be no reason for a distinction, for purposes of taxation, between those who have only seven employees and those who have eight. Yet, this is the type of distinction which the law is often called upon to make. It is only a difference in numbers which marks the moment when day ends and night begins, when the disabilities of infancy terminate and the status of legal competency is assumed. It separates large incomes which are taxed from the smaller ones which are exempt, as it marks here the difference between the proprietors of larger businesses who are taxed and the proprietors of smaller businesses who are not.
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> "Administrative convenience and expense in the collection or measurement of the tax are alone a sufficient justification for the difference between the treatment of small incomes or small taxpayers and that meted out to others. *Citizens Telephone Co. v. Fuller,* 229 U.S. 322, 332; *Hatch v. Reardon,* 204 U.S. 152, 159; *New York v. Latrobe,* 279 U.S. 421, 428; *Aero Transit Co. v. Georgia Public Service Commission,* 295 U. S. 285, 289. Cf. *Florida Central & Peninsular R. Co. v. Reynolds,* 183 U.S. 471, 480; *Packer Corp. v. Utah,* 285 U.S.

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[1]The provision of the Alabama law was as follows: "Where any person . . . either directly or through a holding company or otherwise has a majority control or ownership of otherwise separate business enterprises employing persons in the State, all such enterprises shall be treated as a single 'employer' for the purposes of this Act." Sec. 2(f) Alabama unemployment compensation law, Chapter 447, Laws of 1935 as amended. By amendments in 1939, however, following the decision in the *Carmichael* case, the Alabama unemployment compensation law was changed so that it now no longer contains any provision comparable to that here at issue. Act No. 497, Laws of 1939, effective September 21, 1939.

105, 110, footnote 6. We cannot say that the expense and inconvenience of collecting the tax from small employers would not be disproportionate to the revenue obtained. For it cannot be assumed that the legislature could not rightly have concluded that generally the number of employees bears a relationship to the size of the payroll and therefore to the amount of the tax, and that the large number of small employers and the paucity of their records of employment would entail greater inconvenience in the collection and verification of the tax than in the case of larger employers." (301 U.S. 495, 510, 511)

As indicated above, the common control provision is part and parcel of the basic classification in cases of employers of eight or more.

(a) The common control provision is essential to avoid evasion of the Unemployment Compensation Law.

The manner in which the unemployment compensation law could be evaded if this provision is stricken has been described above. Assuming the statute as a whole is valid, any provision reasonably designed to avoid possible evasion is justified. The avoidance of evasion has frequently been upheld as a basis for classification. See *Tyler v. United States,* 281 U.S. 497, 505; *Helvering v. Bullard,* 303 U.S. 297, 302; *Helvering v. City Bank Farmers Trust Co.,* 296 U.S. 85, 92; *Ruppert v. Caffey,* 251 U.S. 264, 282.

In the recent case of *Natural Gas Pipe Line Company v. Slattery,* 302 U. S. 300, 308, this court upholding as reasonable a statute which gave to the Illinois Commerce Commission jurisdiction over "affiliated interests" of a corporation, said:

"Common management of corporations through officers or directors, or common ownership of a substantial

> amount, though less than a majority of their stock, gives such indication of unified control as to call for close scrutiny of a contract between them whenever the reasonableness of its terms is the subject of inquiry."

See also *Rochester Tel. Corp. v. United States,* 307 U.S. 125, 145.

The Federal Income Tax Laws have for a long time had a provision which requires affiliated corporations to submit consolidated returns. In *United States v. Whyel,* 19 F. (2d) 260, 262, the Circuit Court of Appeals specifically upheld this provision and said in support of its position:

> "* * * The clear purpose of the act as to affiliation was to safeguard the interests of the government against the possible loss of revenue which would result from the evasion of the excess profits tax, through manipulation and shifting of profits, as between two or more closely associated corporations, where there was actual or potential unity of control of corporate affairs. * * *"

A holding that the legislature may not consider the common control of employers for the purpose of determining coverage under the unemployment compensation law in effect constitutes an encouragement to employers to split their establishments, wherever possible into groups employing seven or less.

> (b) The common control provision represents an effort on the part of the legislature to remove discrimination which otherwise would exist.

It has been pointed out above that the common control provision is essential if economic discrimination as among different employers is to be avoided. In imposing a liability for contributions in respect to payrolls, the legislature, above all, had to avoid giving one business establishment a competitive advantage over another. In drawing a basic distinc-

tion between large and small employers, no such advantage was given because the large employer enjoys certain advantages of large scale organization which are not available to the small employer. But when a large employer splits his establishment into several smaller units, he does not lose these advantages; he continues to compete with the employer who has not split his functions. What reason, then, can be stated for giving him an advantage over his competitor? The legislature in its desire to avoid any discrimination of this type qualified the exemption of the small employers so as to equalize the burden of taxation on all employers similarly situated.

The basic test of the constitutionality of any legislative classification is its reasonableness in the light of the purposes of the law. One of the objectives of the common control provision is to remove whatever discriminatory consequences might have ensued from an unqualified exclusion of employers of seven or less. On what basis, then can it be argued that a legislative effort to avoid unjustified discrimination becomes unconstitutional?

It should be noted that the reasons here adduced for this provision have been given judicial recognition in other decisions by the highest courts of other States upholding almost identical provisions of other State unemployment compensation laws. *Unemployment Compensation Commission v. City Ice & Coal Co.*, 216 N.C. 6, 3 S.E.(2d) 290; *Gibson Products Co. v. Murphy*, ... *Okla.* ....., 100 P.(2d) 453; *Florida Industrial Commission v. Gary-Lockhart Drug Co.*, ... *Fla.* ....., 196 So. 845.

3. The controlling question in this case is a Federal question; there is no independent non-federal ground.

It is clear that the Supreme Court of the State of Georgia held section 19(g)(4) of the Georgia unemployment com-

pensation law to be a violation of the equal protection clause of the Federal Constitution. It may be contended, however, that the opinion is also subject to the interpretation that the court held that the provision at issue constituted a violation of the State Constitution and that the case is therefore not subject to review.[1]

This contention would probably be based on the long line of decisions which hold, quite properly, that "where a judgment of a State court rests on two grounds, one involving a Federal question and the other not, this court will not take jurisdiction." *State of Minnesota v. National Tea Co.*, 309 U.S. 551, 554. But this court has sedulously pointed out that "where the non-federal ground is so interwoven with the other as not to be an independent matter, our jurisdiction is plain." *Enterprise Irrigation District v. Canal Co.*, 243 U.S. 157, 164. In each case, then, it is essential to determine whether the alleged non-federal ground is, in fact, independent or whether it is so reliant upon the Federal ground that were the Federal ground to be removed there would be no State ground.

It is submitted that if there is any State ground in the decision of the Supreme Court of Georgia in this case it is in no way independent. It is obvious from the language of the court that it approached the interpretation of the pro-

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[1]The only portion of the opinion where any reference is made to the State Constitution is the following:

> "The exact language of that portion of the United States constitution which the defendant invokes (Code, 1-815) is as follows: 'No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.' The provision of the State constitution invoked (Code, 2-102) declares that, 'Protection to person and property is the paramount duty of government and shall be impartial and complete.' We now place the provisions of the act as applied to the defendant by the side of the constitutional provisions to determine whether there is a violation . . . There is no room for doubt that in such circumstances this defendant is denied the equal protection guaranteed by the Federal constitution and the impartial and complete protection of property guaranteed by the State constitution."

vision of its own constitution as interwoven with the interpretation of the equal protection clause of the Federal Constitution. While in the earlier part of its opinion the court mentions both the State and the Federal constitutional provisions, it is very significant that it concludes the opinion with a reference only to the equal protection clause of the Federal Constitution. At the conclusion of its opinion the court refrained from reference to any provision of the State constitution interwoven with the Federal question that it was not of itself sufficient to support the decision.

Any doubt as to the basis of the court's decision is laid at rest by the certificate of the Chief Justice of the Supreme Court of Georgia. In this certificate (R. 44) he states:

> "I hereby certify that in the case of *Independent Gasoline Company, Incorporated, v. Bureau of Unemployment Compensation,* No. 13,400, April Term, 1940, Supreme Court of Georgia a question under the Federal Constitution was presented and necessarily passed upon by this Court.
>
> "Plaintiff in error contended that Section 19(g)(4) of Act 335 of the 1937 Laws of Georgia; Georgia Code Annotated, Section 54-657 (g)(4), denied it equal protection of the laws and thus did violate the Fourteenth Amendment to the Constitution of the United States.
>
> "This Court held that said Section did violate said provision of the Fourteenth Amendment to the Constitution of the United States, 190 Ga. ....., 10 S.E. (2d), 58."

We emphasize the use of the word "necessarily." In the light of this certification, it is clear beyond doubt that the State ground was so interwoven with the Federal question that it was not of itself sufficient to support the decision.

If there remains any question as to the precise grounds of the decision below, this court has jurisdiction to clarify any such obscurity.

In the very recent case of *Minnesota v. National Tea Co.*, 309 U.S. 551, 557, this court, considering what it believed to be a vital principle touching "the division of authority between State courts and this court", stated that "*ambiguous or obscure adjudications by State courts do not stand as barriers to a determination by this Court of the validity under the Federal Constitution of State action.*" See also *Honeyman v. Hanan,* 300 U.S. 14; *State Tax Commission v. Van Cott,* 306 U.S. 511.

In the *National Tea Company* case, this court had before it an opinion of the Supreme Court of the State of Minnesota which held unconstitutional a State statute on the grounds that it violated the Fourteenth Amendment of the Federal Constitution and also a provision of the State constitution. With reference to the jurisdictional question, it was observed:

> "Enough has been said to demonstrate that there is considerable uncertainty as to the precise grounds for the decision * * *
>
> "But that does not mean that we should dismiss the petition. This court has frequently held that in the exercise of its appellate jurisdiction it has the power not only to correct errors of law in the judgment under review but also to make such disposition of the case as justice requires. *State Tax Commission v. Van Cott,* 306 U.S. 511; *Patterson v. Alabama,* 294 U.S. 600. That principle has been applied to cases coming from state courts where supervening changes had occurred since entry of the judgment, where the record failed adequately to state the facts underlying a decision of the federal question, and where the grounds of the state

decision were obscure. *Honeyman v. Hanan,* supra, and cases there cited. That principle was also applied in *State Tax Commission v. Van Cott,* supra, where it was said, 514:

> '* * * if the state court did in fact intend alternatively to base its decision upon the State statute and upon an immunity it thought granted by the Constitution as interpreted by this Court, these two grounds are so interwoven that we are unable to conclude that the judgment rests upon an independent interpretation of the State law.'

"The procedure in those cases was to vacate the judgment and to remand the cause for further proceedings, so that the federal question might be dissected out or the state and federal questions clearly separated." (309 U.S. 551, 555, 556).

CONCLUSION

Wherefore, it is respectfully submitted that this petition for a writ of certiorari be granted.

ELLIS ARNALL
Attorney General of the State of Georgia.

CLIFFORD WALKER
General Counsel, Bureau of Unemployment Compensation of the State of Georgia.

OTIS L. HATHCOCK

Attorneys for Petitioners.

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